

RESPONSE TO MOTION TO DISMISS

The State's inadvertent errors made in presenting evidence to the grand jury do not justify dismissing the indictment with prejudice. The proper remedy is to remand the case to the grand jury for a new finding of probable cause.

The State of Arizona, by and through the undersigned counsel, requests the Court to deny the defendant's motion to dismiss, for the reasons set forth in the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

This case has been to the Grand Jury five times and the defendant now asks the Court dismiss this case with prejudice for prosecutorial misconduct. The State has erred each time in its presentation of the evidence. The State contends the remedy for each error is to remand the case to the Grand Jury, not to dismiss the case with prejudice as the defendant requests. Dismissal of an indictment with prejudice on the grounds of prosecutorial misconduct is rare. *United States v. Birdman*, 602 F.2d 547 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980); *State v. Young*, 149 Ariz. 580, 720 P.2d 965 (App. 1986).

In *State v. Young*, *supra*, the court cited *United States v. Lawson*, 502 F. Supp. 158, 172-73 (D.Md.1980):

Defendants are entitled to the remedy of dismissal for violations of their constitutionally protected right; they are not entitled to the reward of permanent immunity respecting their alleged criminal conduct [T]he costs to society are simply too high.

The Court in *Young* went on to state that they could find no reason to justify the dismissal of an indictment with prejudice where the error before the grand jury was not prejudicial.

The State, in its presentation, has admittedly failed to present all the evidence; however, the State has never intentionally withheld any evidence to avoid damaging the case. In the instant case, the defendant has not alleged any prejudice nor can he show any prejudice; therefore, the proper remedy is to remand the case to the grand jury for a new finding of probable cause.